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No. 06-1615

In the

SUPREME COURT OF THE UNITED STATES

LE BON BRUCE WALKER,
Petitioner,

v.

NEIL SELDMAN, *et al.*
Respondents,

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

Petitioner, Le Bon Bruce Walker ("Walker"), has raised three questions in his Petition for Writ of Certiorari which simply are not before this Court. Walker's questions presented and arguments bear on the merits of the dismissal of his case in the Superior Court of the District of Columbia; however, the merits of the dismissal of Walker's case was not before the District of Columbia Court of Appeals on the appeal to which this Petition has been filed.

At the heart of this case is a sole parcel of real property located in the District of Columbia (the "Property"). Walker owned the Property and Respondent, Neil Seldman ("Seldman") held a Deed of Trust securing the repayment of a loan in the amount of $174,000.00. When Walker defaulted on his payments under the terms of the loan, Seldman instituted foreclosure proceedings.

Walker subsequently filed suit in the District of Columbia against Seldman and the Trustees, Elizabeth Menist and Diane Stewart (the "Trustees"), alleging that Seldman and the Trustees had wrongfully foreclosed on the Property on the basis that he had the right to cure his default pursuant to D.C. Code § 42-815.01, which applied to residential property. The sole issue reserved for trial was whether or not the Property was Walker's primary residence and, thus, whether D.C. Code § 42-815.01 was applicable.

On the day of trial, Walker made an oral motion for continuance, which the trial court denied. Walker then chose not to proceed to trial, and his case was dismissed for failure to prosecute. Walker appealed to the District of Columbia Court of Appeals.

In Appeal No. 05-CV-1049 (the "First Appeal"), Walker challenged the Superior Court's discretion in denying his oral motion for continuance on the day of trial and dismissing his case for want of prosecution when he chose not to proceed with the trial.

The Court of Appeals subsequently granted Seldman's Motion for Summary Affirmance and denied Walker's Petition for Rehearing or Rehearing En Banc. The Court of Appeals issued its Mandate in the First Appeal on February 23, 2006, and Walker filed a Motion to Recall the Mandate, which the Court denied. Walker never petitioned this Court for a Writ of Certiorari following the First Appeal.

Prior to the First Appeal, Seldman had filed a Motion for Cancellation and Release of Notice of Lis Pendens and a Motion for Attorneys' Fees and Costs in the Superior Court. Seldman supported his Motion for Attorneys' Fees and Costs with a copy of the Deed of Trust at issue in this case, which provided that:

> "[i]n the event that Grantor [Walker] breaches any of the covenants, undertakings or warranties of this Deed of Trust, or institutes or defends any litigation in an attempt to prevent Holder [Seldman] from enforcing the terms of the Deed of Trust or Note and does not prevail in that litigation, then Holder will be entitled to damages from the Grantor, including the amount of any counsel fees and other litigation expenses incurred in enforcing the Deed of Trust and Note."

(Emphasis supplied). Seldman further supported his Motion with an Affidavit of G. Vann Canada, Jr., Esquire, along with a

true and correct copies of invoices and billing information evidencing Seldman's attorneys' fees, which were reasonably incurred by Seldman.

In an Order dated July 25, 2005, the Superior Court determined that Seldman was entitled to attorneys' fees and costs pursuant to the Deed of Trust that was foreclosed, and was mindful of "the prejudice created by the *lis pendens* and of the financial burden of having to advance his attorney's fees to defend against Plaintiff's action to set aside the foreclosure." See Petition for Certiorari, Appx. at 24. Nevertheless, the Court deferred ruling on the Motion for Cancellation and Release of Notice of Lis Pendens and Motion for Attorneys' Fees and Costs "until the time for noting an appeal from this order has expired or until the disposition of any appeal that may be taken." See Petition for Certiorari, Appx. at 25.

After the Court of Appeals issued its Mandate in the First Appeal, Seldman filed a Supplement to his Motion for Cancellation and Release of Notice of Lis Pendens and Motion for Attorneys' Fees and Costs in the Superior Court. In the Supplement, Seldman advised the Superior Court that the Court of Appeals had granted summary affirmance in favor of Seldman and had issued its Mandate. Seldman further provided a Supplemental Affidavit of G. Vann Canada, Jr., Esquire, along with a true and correct copy of additional invoices and billing information evidencing Seldman's additional attorney's fees and costs, which were reasonably incurred by Seldman, since the filing of his original Motion for Attorneys' Fees and Costs.

Walker filed an opposition to Seldman's Motion for Cancellation and Release of Notice of Lis Pendens and Motion for Attorneys' Fees and Costs. Although Walker challenged Seldman's entitlement to attorneys' fees and costs, he

presented no affidavits or other evidence to refute the reasonableness of attorneys' fees and costs claimed by Seldman.

In an Order dated April 13, 2006, the Superior Court granted Seldman's motions. The Court specifically held that:

> Defendant's motion for cancellation and release of the notice of lis pendens will be granted. Pursuant to D.C. Code § 42-1207(d), Defendant Seldman now has a final judgment of dismissal and he is entitled to an order canceling and releasing the notice of lis pendens.
>
> Defendant is also entitled to an award of attorneys' fees and costs. Plaintiff defaulted on his mortgage. Defendant Seldman foreclosed. Plaintiff filed this action seeking to set aside the foreclosure alleging, inter alia, wrongful foreclosure, conspiracy to commit fraud and unjust enrichment. Plaintiff's Deed of Trust provided, in pertinent part:
>
> > In the event that Grantor breaches any of the covenants, undertakings or warranties of this Deed of Trust, or institutes or defends any litigation in an attempt to prevent Holder from enforcing the terms of the Deed of Trust or Note and does not prevail in that litigation, then Holder will be entitled to damages from the Grantor, including the amount of any

> counsel fees and other litigation expenses incurred in enforcing the Deed of Trust and Note.

Plaintiff, to say the least, "does not prevail in that litigation." He narrowly escaped summary judgment and then elected not to proceed on the day of trial. There has now been entered a final judgment of dismissal, and Plaintiff has exhausted all rights of appeal.[1] The provision for attorneys' fees in the Deed of Trust is clear and unambiguous. The only question for the court is whether the fees requested are "reasonable." Concord Enterprises, Inc. v. Binder, 710 A.2d 219, 225 (D.C. 1998). The court has carefully scrutinized Defendant's statement of fees submitted by his counsel. The amount, while large, is fully justified by the nature of the litigation. The hours spent by counsel were reasonably necessary to defend the action brought by Plaintiff, and the hourly rate charged by the attorneys were certainly commercially reasonable considering the competence and experience of the attorneys involved.[2]

As the prevailing party, Defendant Seldman is entitled to an award of costs pursuant to Super. Ct. Civ. Rule 54(d). This covers filing fees and other ordinary court costs. Extraordinary costs are recoverable under 54-I. This certainly includes deposition transcripts, records search and fees for copying, and other expenses for material to be used at trial or necessary for the preparation of an adequate defense. Defendant

> Seldman also seeks costs for Westlaw research, long distance calls, travel to court, parking and the like. Whether or not the court would exercise its discretion to award these amounts pursuant to Rule 54-I, they are plainly reasonable under the circumstances of this case and recoverable as a matter of contract under Paragraph 10 of the Deed of Trust.

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[1] It is both wrong and disingenuous for Plaintiff to argue that the dismissal of this action was not a judgment on the merits. Pursuant to Super. Ct. Civ. R. 41(b), the dismissal is an adjudication on the merits. Moreover, Plaintiff's election not to proceed to trial on April 25, 2005, deprived Defendants of their opportunity to demonstrate once and for all that Plaintiff's challenge to the foreclosure was without merit.

[2] At least some of the attorneys' fees charged were attributable to the rather haphazard way in which Plaintiff chose to litigate his action. Even a cursory review of the motions and orders in the court file demonstrates Plaintiff's numerous defaults in his discovery obligations and failure to prosecute his case with reasonable diligence.

See Petition for Certiorari, Appx. at 13-16.

Pursuant to the April 13, 2006, Order, the Superior Court:

> Ordered that, pursuant to D.C. § 42-1207(d), the judgment shall expressly provide that the notice of lis pendens recorded in the Land Records of the District of Columbia Recorder of Deeds as instrument no. 58964 on May 14, 2003, is cancelled and released; and it further
>
> Ordered that the judgment for Defendant Seldman shall include the award of attorney's fees in the amount of $91,702.50 and costs in the amount of $3,367.05, plus the cost of canceling and releasing the notice of lis pendens, plus interest on these amounts at the statutory rate from the date of judgment.

Walker subsequently filed another appeal to the District of Columbia Court of Appeals, docketed as 06-CV-479 (the "Second Appeal"). The Court of Appeals granted Seldman's Motion for Summary Affirmance in the Second Appeal, denied Walker's Petition for Rehearing or Rehearing En Banc, and the present Petition for Certiorari ensued.

II. ARGUMENT

Petitioner, Le Bon Bruce Walker ("Walker"), has raised three questions in his Petition for Writ of Certiorari which simply are not before this Court. Walker's questions presented and arguments bear on the merits of the dismissal of his case in the Superior Court of the District of Columbia; however, the merits of the dismissal of Walker's case was not before the District of Columbia Court of Appeals in Walker's Second Appeal to which this Petition has been filed.

The merits of the dismissal of Walker's case had been the subject of Walker's First Appeal to the District of

Columbia Court of Appeals. Because Walker failed to petition this Court subsequent to the decision in the First Appeal granting Seldman's Motion for Summary Affirmance, all arguments raised by Walker in the present Petition should be deemed waived.

The sole issues before the Court of Appeals of the District of Columbia in Walker's Second Appeal was whether or not the lower court properly cancelled and released the Notice of Lis Pendens recorded by Walker, and whether the lower court properly granted Seldman's Motion for Attorney's Fees and Costs. Clearly, the District of Columbia Court of Appeals properly granted summary affirmance in favor of Seldman on those issues.

A. The Superior Court Properly Entered A Judgment Cancelling and Releasing the Notice of Lis Pendens pursuant to the Express Provisions of D.C. Code § 42-1207.

Notices of Lis Pendens in the District of Columbia are governed by the provisions of D.C. Code § 42-1207. Pursuant to D.C. Code § 42-1207(d), "if judgment is rendered in the action or proceeding against the party who filed the notice of the pendency, the judgment shall order the cancellation and release of the notice at the expense of the filing party as part of the costs of the action or proceeding. When appropriate, the Court may also impose sanctions for the filing."

A court is to give effect to the plain meaning of clear and unambiguous language contained within a statute. Leonard v. District of Columbia, 801 A.2d 82, 84 (D.C. 2002). It is well-settled law that the word "shall" used in a statute is a term which creates a duty, not an option. Parrish

v. District of Columbia, 718 A.2d 133 (D.C. 1998). Thus, the normal rule is that verbs used in statutes, such as "must" or "shall," denote mandatory requirements unless such construction in inconsistent with the manifest intent of the legislature or repugnant to the context of the statute. Leonard, 801 A.2d at 84-85 (D.C. 2002) (citing Riggs Nat'l Bank of Washington, D.C. v. District of Columbia, 581 A.2d 1229, 1257 (D.C. 1990)).

There is no dispute in this case that Walker filed for recordation a Notice of Lis Pendens among the Land Records of the Recorder of Deeds of the District of Columbia referencing the present action. There is further no dispute that judgment was rendered against Walker in the present action. Consequently, by virtue of the express language of D.C. Code § 42-1207(d), the Superior Court was required to order the cancellation and release of the Notice of Lis Pendens at the expense of Walker as part of the costs of this action.

B. The Superior Court Properly Entered A Judgment For Attorneys' Fees and Costs Against Walker.

Under the "American Rule," each litigant bears his or her own attorneys' fees and litigation expenses. An exception to this "American Rule" arises, however, when the parties allocate the fees and expenses among themselves by contract. Concord Enterprises, Inc. v. Binder, 710 A.2d 219, 225 (D.C. 1998). Thus, where a contractual agreement expressly provides for the payment of attorneys' fees, the trial court's discretion is limited to ascertaining what amount constitutes a reasonable fee award. Id. In other words, absent public policy considerations or other unusual circumstances, the duty of the trial court is to give meaning to the full agreement of the parties, as interpreted by

controlling case law. Id. Consequently, when a Deed of Trust awards to a lender all costs and expenses of litigation arising out of the Deed of Trust, such a provision will generally be in force so long as it does not reimburse a party for greater than reasonably incurred expenses. Id.

The determination of whether an award of attorneys' fees is an appropriate amount is a matter addressed to the trial court's sound discretion. Assoc. of American Railroads v. Connerton, 723 A.2d 858, 864 (D.C. 1999). District of Columbia v. Jerry M., 580 A.2d 1270, 1280 (D.C. 1990). An award of attorneys' fees will be reversed "only upon an `an extreme showing . . . that an award is so arbitrary as to constitute an abuse of discretion.'" Connerton, 723 A.2d at 864 (quoting Bagley v. Foundation for the Preservation of Historic Georgetown, 647 A.2d 1110, 1115 (D.C. 1994)). "`Moreover, a request for attorney's fees should not result in second major litigation.'" Id.

This case was instituted by Walker in an attempt to set aside a foreclosure under the terms of a Deed of Trust and Note which he executed in favor of Seldman. There is no dispute that the Deed of Trust at issue provided that:

> [i]n the event that Grantor [Walker] breaches any of the covenants, undertakings or warranties of this Deed of Trust, or institutes or defends any litigation in an attempt to prevent Holder [Seldman] from enforcing the terms of the Deed of Trust or Note and does not prevail in that litigation, then Holder will be entitled to damages from the Grantor, including the amount of any counsel fees and other litigation expenses incurred in enforcing the Deed of Trust and Note.

(Emphasis supplied).

Based upon the above-captioned language, the Court properly determined that the language of the Deed of Trust was clear and unambiguous and that Seldman was entitled to attorneys' fees and costs because Walker did "not prevail" in this action when judgment was entered against him. Consequently, under the principles enunciated in Concord Enterprises, Inc. v. Binder, supra, the Superior Court's discretion was limited to ascertaining what amount constituted a reasonable fee award for Seldman under the express language of the Deed of Trust.

The Superior Court clearly exercised proper discretion in determining the amount owed to Seldman. Seldman presented the Superior Court with all of his invoices and billing information supported by Affidavits executed by G. Vann Canada, Jr., which set forth in detail all legal tasks, time, billing rates and charges, which were directly related to the litigation and which were reasonable and necessary under the circumstances. Although Walker challenged Seldman's entitlement to attorneys' fees and costs, he presented no affidavits or other evidence to refute the reasonableness of attorneys' fees and costs claimed by Seldman. In its opinion, the Court stated that:

> The court has carefully scrutinized Defendant's statement of fees submitted by his counsel. The amount, while large, is fully justified by the nature of the litigation. The hours spent by counsel were reasonably necessary to defend the action brought by Plaintiff, and the hourly rate charged by the attorneys were certainly commercially reasonable considering the

> competence and experience of the attorneys involved.[2]
>
> As the prevailing party, Defendant Seldman is entitled to an award of costs pursuant to Super. Ct. Civ. Rule 54(d). This covers filing fees and other ordinary court costs. Extraordinary costs are recoverable under 54-I. This certainly includes deposition transcripts, records search and fees for copying, and other expenses for material to be used at trial or necessary for the preparation of an adequate defense. Defendant Seldman also seeks costs for Westlaw research, long distance calls, travel to court, parking and the like. Whether or not the court would exercise its discretion to award these amounts pursuant to Rule 54-I, they are plainly reasonable under the circumstances of this case and recoverable as a matter of contract under Paragraph 10 of the Deed of Trust.
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> [2] At least some of the attorneys' fees charged were attributable to the rather haphazard way in which Plaintiff chose to litigate his action. Even a cursory review of the motions and orders in the court file demonstrates Plaintiff's numerous defaults in his discovery obligations and failure to prosecute his case with reasonable diligence.

See Petition for Certiorari, Appx. at 15-16.

Based upon the undisputed evidence before the Superior Court and its careful consideration of Seldman's

claim for attorneys' fees and costs, as set forth above, there is no question that the lower court properly exercised its discretion. There is absolutely no basis in the record which could support a finding that the Superior Court's award was so arbitrary as to constitute an abuse of its discretion. Under these circumstances, the District of Columbia Court of Appeals properly granted Seldman's Motion for Summary Affirmance.

III. CONCLUSION

For the foregoing reasons, Respondent, Neil Seldman respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of July, 2007, three (3) copies of the foregoing was mailed via first class mail, postage prepaid, to the following:

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Washington, DC 20002

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